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Civil Procedure

Civil Procedure; stay of execution of contempt sentences— county government

Code of Civil Procedure § 128 (amended).
SB 433 (McCorquodale); 1987 STAT. Ch. 3
(Effective March 11, 1987)*

Under existing law, if a court makes an order of contempt¹ affecting an attorney,² public safety employee,³ or the victim of a sexual assault,⁴ the execution of any sentence must be stayed pending the filing⁵ of a petition for extraordinary relief testing the lawfulness of the court's order.⁶ Chapter 3 expands existing law by providing that if an order of contempt is made affecting a county government or governing body, the execution of any sentence must be stayed for thirty days, and any additional period as granted by the reviewing court.⁷ Furthermore, if a petition for extraordinary relief is denied,

* Section 128 of the Code of Civil Procedure as amended by section 1 of Chapter 3 became effective on March 11, 1987. 1987 Cal. Stat. ch. 3, sec. 4, at _____. This section expires on March 11, 1989, when section 128 of the Code of Civil Procedure as amended by Section 2 of Chapter 3 becomes effective. 1987 Cal. Stat. ch. 3, sec. 3, at _____.

1. See CAL. CIV. PROC. CODE § 1209(a)(5) (disobedience of any lawful judgment, order, or process of the court constitutes contempt).

2. See *id.* § 128(b) (also includes the attorney's agent, investigator, or a person acting under the attorney's direction).

3. See *id.* § 128(c) (definition of public safety employee).

4. See *id.* § 128(d) (definition of sexual assault).

5. See *id.* § 128(b) (the petition for extraordinary relief testing the lawfulness of the court's order must be filed within three judicial days of the court's order of contempt).

6. *Id.* § 128 (existing law provides for an examination of the basis of the contempt order to test the order's lawfulness). See *id.* § 1218 (maximum punishment for civil contempt is a \$500 fine or 5 days in jail, or both); see also *id.* § 1219 (where contempt consists of failure to perform an act within the person's power to perform, that person may be imprisoned until compliance). See generally *Review of Selected 1984 California Legislation*, 16 PAC. L.J. 461, 543 (1984) (examination of contempt statute concerning sexual assault victims).

7. CAL. CIV. PROC. CODE § 128(e). See *In re Baroldi*, 189 Cal. App. 3d 101, 106, 234 Cal. Rptr. 286, 288 (1987) ("The court has both the statutory power and the inherent power to adjudge and punish for contempt.").

execution of the contempt order must be stayed for five judicial days.⁸

LAL

8. *Id.* § 128(e).

Civil Procedure; costs—dishonored instruments

Civil Code § 1719 (amended); Code of Civil Procedure § 1033 (amended).

SB 3 (Deddeh); 1987 STAT. Ch. 4

(Effective March 17, 1987)

Under existing law, any person who fails to pay in cash the amount owed on any check,¹ draft,² or order³ which was dishonored⁴ for lack of funds,⁵ or because the maker stopped payment within thirty days of a written demand, is liable to the payee for treble damages unless payment was stopped to resolve a good faith dispute⁶ with the payee.⁷ Chapter 4 permits an assignee to bring such a cause of action in municipal or justice court.⁸ An assignee working on behalf of the

1. CAL. COM. CODE § 3104(2)(b) (definition of check).

2. *Id.* § 3104(2)(a) (definition of draft). See generally 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Negotiable Instruments* § 7 (9th ed. 1987) (discussion of what constitutes a draft or a check).

3. CAL. COM. CODE § 3102(b) (definition of order).

4. *Id.* § 3507(1)(a), (b) (an instrument is dishonored when the instrument is duly presented and payment is refused or cannot be obtained within the prescribed time, or in case of bank collections, the instrument is seasonably returned by the midnight deadline, or if presentment is excused and the instrument is not duly accepted or paid). See *id.* § 3508(3) (notice of dishonor may be given in any reasonable manner that identifies and states that the instrument has been dishonored). See generally 3 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Negotiable Instruments* § 121 (9th ed. 1987) (discussion of what constitutes dishonor).

5. CAL. CIV. CODE § 1719(a) (or credit to pay, because the maker has no account with the drawee, or because the maker instructed the drawee to stop payment).

6. *Id.* § 1719(b) (a good faith dispute is one in which the court finds that the maker had a reasonable belief in their legal entitlement to withhold payment).

7. *Id.* § 1719(a) (the payee is entitled to the damages upon proving by clear and convincing evidence that there was no good faith dispute). A cause of action may be brought in any appropriate court if the judgment award does not exceed the jurisdiction of that court. *Id.* § 1719(e). Because the maker instructed the drawee to stop payment so that the maker could recover damages, the payee must show, to the satisfaction of the trier of fact, that there was a reasonable effort on the part of the payee to reconcile and resolve the dispute prior to pursuing the dispute through the courts. *Id.*

8. *Id.* § 1719(f) (a cause of action under this section may not be brought by an assignee in small claims court).

payee, however, may not charge the payee a greater flat fee or percentage for collecting the treble damage than the assignee would have charged for collecting the face amount of the dishonored instrument.⁹

Existing law provides that if the prevailing party recovers a judgment that could have been rendered in a court of lesser jurisdiction, all costs must be determined in the court's discretion.¹⁰ The above procedure, however, is only applicable in Superior Courts.¹¹ Chapter 4 requires that in a municipal or justice court, if a plaintiff recovers less than the jurisdictional amount allowed in small claims court, and: (1) If the action could have been brought in the small claims court, the court may allow or deny costs in any amount as it deems proper; or (2) if the party could not have brought the action in the small claims court, costs and necessary disbursements must be limited to the actual cost of the filing fee and the actual costs of service of process.¹²

SAW

9. *Id.*

10. CAL. CIV. PROC. CODE § 1033(a).

11. *Id.* § 1033(a), (b)(1), (2).

12. *Id.* § 1033(b)(1), (2). Costs shall only be awarded to the plaintiff if the court is satisfied that the plaintiff informed the defendant in writing of the intended legal action before the action began, and that the action could result in a judgment against the defendant which could include costs and necessary disbursements allowed. *Id.* § 1033(b)(2).

Civil Procedure; jurisdiction—special appearances

Code of Civil Procedure § 418.11 (new).

AB 577 (Stirling); 1987 STAT. CH. 62

Existing law allows a defendant to contest jurisdiction by simultaneously filing a motion to quash service of summons and a motion to stay or dismiss an action on grounds of an inconvenient forum.¹ In apparent response to *California Overseas Bank v. French American*

1. CAL. CIV. PROC. CODE § 418.10. See *id.* § 410.30 (a special appearance is not permitted when filing a motion for a stay or dismissal of an action on grounds of inconvenient forum after the defendant has made a general appearance).

Banking Corp.,² Chapter 62 specifies that an appearance at a hearing to seek ex parte relief,³ or a provisional remedy by ex parte application, is not a general appearance or a waiver of defects in jurisdiction.⁴

PSS

2. 154 Cal. App. 3d 179, 201 Cal. Rptr. 400 (1984) (trial court's approval of a motion to quash service was in error when the defendant had appeared, a month earlier, at a hastily called conference to oppose a temporary restraining order). *Id.* at 181-85, 201 Cal. Rptr. at 401-03. *See generally* Bank of America Nat'l. Trust & Sav. Ass'n v. Harrah, 113 Cal. App. 2d 639, 248 P.2d 814 (1952) (a defendant makes a special appearance if only objecting to the court's exercise of jurisdiction, but the defendant will have made a general appearance if any other questions or types of relief based upon the idea that the court has jurisdiction are raised).

3. *See generally* 6 B. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Proceedings without Trial* § 42 (1985) (ex parte applications, are permitted when necessary to give immediate relief, or when the type of order sought does not give an adverse party the right to oppose the order, such as when acting on the court's own motion).

4. CAL. CIV. PROC. CODE § 418.11. *See generally* WEHL & BROWN, CALIFORNIA PRACTICE GUIDE, *Civil Procedure Before Trial* §§ 3.54-3.70 (1981 & Supp. 1987) (appearance or consent as a basis for personal jurisdiction).

Civil Procedure; discovery

Code of Civil Procedure §§ 2018 (new); §§ 93, 94, 2016, 2017, 2019, 2020, 2023, 2024, 2025, 2026, 2027, 2028, 2030, 2031, 2032, 2033, 2033.5, 2034, 2035, 2036 (amended).

AB 361 (Harris); 1987 STAT. Ch. 86

(Effective on July 1, 1987)

I. SCOPE OF DISCOVERY

Under existing law, for actions in municipal and justice courts, the plaintiff has the option of serving case questionnaires¹ with a complaint designed to elicit fundamental information about the other party's case.² With the enactment of Chapter 86, if a party served

1. CAL. CIV. PROC. CODE § 93(a). Questionnaires must include a completed copy of the plaintiff's case questionnaire along with a blank copy of the defendant's questionnaire. *Id.* *See* CAL. R. CT. 982(a)(21) (forms for case questionnaires).

2. CAL. CIV. PROC. CODE § 93(a), (c). Fundamental information to be elicited by the case questionnaire includes names and addresses of all witnesses with knowledge of relevant facts, a list of all documents relevant to the case, a statement of the nature and amount of

with a case questionnaire fails to serve a timely or completed response, the serving party can move for an order compelling further response and for a monetary sanction.³ If the served party fails to obey the order compelling a response, the court may, in addition to imposing a monetary sanction, make any orders that are just, including the imposition of an issue sanction, an evidence sanction, or a termination sanction.⁴

II. PROTECTION FOR WORK PRODUCT

Under The Civil Discovery Act of 1986 (Act), information or material prepared in anticipation of litigation or trial by or for a party, or that party's attorney, insurer, surety, indemnitor, or agent was discoverable only if the party seeking discovery could show both (1) specific facts evincing a substantial need of a particular item of work product in preparation for trial, and (2) an inability without undue hardship to obtain the substantial equivalent of that item by other means.⁵ Chapter 86 changes the Act by providing that the work product of an attorney is not discoverable unless the court determines that denial will unfairly prejudice the party seeking discovery in preparing the party's claim or defense, or will otherwise result in injustice.⁶ Discovery of work product, under Chapter 86, is intended to be a restatement of existing law and is not intended to expand or reduce the extent to which work product is discoverable under existing law.⁷

damages, and information concerning insurance coverages, injuries, and treating physicians. *Id.* § 93(c). The defendant must serve the completed questionnaire with the answer. *Id.* § 93(b).

3. *Id.* § 93(e). *See id.* § 2023 (monetary sanctions for misuse of the discovery process).

4. *Id.* § 93(e). *See id.* §§ 2032(b)(2) (issue sanctions), 2032(b)(3) (evidence sanction), 2032(b)(4) (termination sanction).

5. 1986 Cal. Stat. ch. 1334, secs. 1, 2, at 471 (repealing and enacting CAL. CIV. PROC. CODE § 2018(b)). If an expert, who had not been designated a trial witness under California Code of Civil Procedure section 2034, had been consulted, retained, or specially employed by a party in anticipation of trial, any other party could discover the expert's identity and any facts observed by that expert by (1) making a showing of exceptional circumstances making it impracticable for the party seeking those facts by any other means, or (2) an exchange of medical reports under California Code of Civil Procedure section 2032(h) and (j). 1986 Cal. Stat. ch. 1334, secs. 1, 2, at 471 (repealing and enacting CAL. CIV. PROC. CODE § 2018(c)).

6. CAL. CIV. PROC. CODE § 2018(b). Any writing that reflects an attorney's impressions, conclusions, opinions, legal research, or theories is not discoverable under any circumstances. *Id.* § 2018(c). The policy of the state is to (1) preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases; and (2) to prevent attorneys from taking undue advantage of their adversary's industry and efforts. *Id.* § 2018(a).

7. *Id.* § 2018(d).

III. MISUSE OF DISCOVERY

Under existing law, abuses of the discovery process include, but are not limited to: (1) Persisting, over objection, in an attempt to obtain information or materials outside the scope of permissible discovery; (2) using a discovery method in a manner that does not comply with specified procedures; (3) using a discovery method in a manner or to an extent that causes unwarranted annoyance, embarrassment, oppression, or undue burden and expense; (4) failing to respond to an authorized method of discovery; (5) making an unmeritorious objection or evasive response to discovery; (6) disobeying a court order to provide discovery; or (7) failing to confer in person, by telephone, or by letter with an opposing attorney in a reasonable and good faith attempt to informally resolve any dispute concerning discovery, if the discovery method used requires an informal conference as a prerequisite to making or opposing a motion to compel discovery, or to limit the scope or the method of discovery.⁸ Chapter 86 adds that making or opposing a motion to compel or to limit discovery, unsuccessfully and without substantial justification, is also a misuse of the discovery process.⁹ Furthermore, if a party or attorney fails to confer with an opposing party or attorney in a good faith manner as required by a discovery provision, the court must impose a monetary sanction ordering the party or attorney to pay the reasonable expenses, including attorney's fees, incurred as a result of the conduct.¹⁰

IV. TIME EXTENSION FOR SERVICE AND RESPONSES TO NOTICES WHEN MAILED

Under the Act, the period for serving or responding to specified discovery methods was extended by five days if the notice was mailed.¹¹ With the enactment of Chapter 86, time extensions for any

8. *Id.* § 2023(a)(1)-(6), (9).

9. *Id.* § 2023(a)(8).

10. *Id.* § 2023(a)(9). Notwithstanding the outcome of a particular discovery motion, the court must impose a monetary sanction ordering that any party or attorney who fails to confer as required pay the reasonable expenses, including attorney's fees, incurred as a result of the failure to confer. *Id.* A request for a sanction must identify every person, party, and attorney against whom a sanction is sought, and specify the type of sanction requested in the notice of motion. *Id.* The notice of motion must be supported by points and authorities and a declaration. *Id.* § 2023(c). *See also id.* § 2017(c) (motion for protective order must be accompanied by a declaration stating facts showing a good faith attempt at an informal resolution of each issue presented by the motion).

11. *See* 1986 Cal. Stat. ch. 1334, secs. 1, 2, at ____ (repealing and enacting CAL. CIV. PROC. CODE §§ 2028(c), (d) (serving cross questions, redirect questions, recross questions, or objections

method of discovery or motion where service is made by mail are (1) five days if the place of address is within California; (2) ten days if outside California but within the United States; and (3) twenty days if outside the United States.¹²

V. TIME LIMITS FOR DISCOVERY

Under existing law, any party is entitled to complete discovery proceedings until thirty days, and to have motions concerning discovery heard until fifteen days, before the date initially set for trial.¹³ Under Chapter 86, the time limit on completing discovery in an action to be arbitrated¹⁴ is subject to Judicial Council Rule.¹⁵

VI. MECHANICS OF DISCOVERY

A. Interrogatories to a Party

1. Limitation on Number of Interrogatories

The Act prohibits a party from propounding more than thirty-five interrogatories, unless the number is increased by stipulation or court order.¹⁶ Furthermore, any particular interrogatory that exceeded the statutory limit need not have been considered if the responding party

to a party noticing a written deposition), 2030(h) (response to interrogatories), 2031(h) (response to an inspection demand), 2031(l) (notice of motion to compel a response to inspection demand), 2033(h) (response to requests for admission), 2033(l) (notice of motion to compel a response to requests for admission)); *id.* ch. 1336, sec. 1, at ____ (enacting CAL. CIV. PROC. CODE § 2032(h)) (delivery of a copy of a mental or physical examination report demanded by an adverse party).

12. CAL. CIV. PROC. CODE § 2019(e). *See id.* § 1013(a) (extension of time for service by mail).

13. *Id.* § 2024 (discovery is considered completed on the day a response is due or on the day a deposition begins).

14. *See id.* §§ 1141.10-1141.21 (provisions for judicial arbitration).

15. *Id.* § 2024(b). The court must impose a monetary sanction against any party who unsuccessfully makes or opposes a motion to extend or reopen discovery without substantial justification, unless imposing the sanction would be unjust. *Id.* § 2024(e). The parties involved in arbitration have the right to take depositions and to obtain discovery under Part 4, Title 3, Chapter 3 of the California Code of Civil Procedure, except that all discovery must be completed no later than 15 days prior to the date set for arbitration hearing. CAL. R. CT. 1612. After an award in a case ordered to judicial arbitration, completion of discovery is limited by California Code of Civil Procedure section 1141.24. CAL. CIV. PROC. CODE § 2024(b). *See generally id.* § 2023 (monetary sanctions).

16. 1986 Cal. Stat. ch. 1334, secs. 1, 2, at ____ (repealing and enacting CAL. CIV. PROC. CODE § 2030(c)(1)).

stated a specific objection.¹⁷ Chapter 86 substantially reenacts these provisions but clarifies that the limit of thirty-five interrogatories applies only to interrogatories specially prepared for an individual case, and permits a party to propound any additional number of official Judicial Council form interrogatories that are relevant to the subject matter of the action.¹⁸ Chapter 86 also provides that unless an appropriate declaration¹⁹ is made the party need only respond to the first thirty-five specially prepared interrogatories if the party states a specific objection to the balance on the ground that the limit has been exceeded.²⁰

2. *Answers to Interrogatories*

Under the Act, if an answer to an interrogatory required the preparation of a summary²¹ of or from the writings of the party to whom the interrogatory was directed, and if that summary did not already exist, *or* if the burden or expense of preparing the summary would have been substantially the same for the propounding party as for the responding party, the responding party may have elected to specify the writings where the answer could have been derived or ascertained.²² The interrogating party was then permitted to examine, audit, or inspect the writings.²³ Chapter 86 substantially reenacts these provisions but specifies that the conditions must be conjunctive by

17. *Id.* See generally *Review of Selected 1986 California Legislation*, 18 PAC. L.J. 500, 514-16 (1987) (limitation on number of interrogatories).

18. CAL. CIV. PROC. CODE § 2030(c)(1). See CAL. R. CT. 331 (format for discovery requests). If the initial set of specially prepared interrogatories does not exhaust the limit of 35, the balance may be propounded in subsequent sets. CAL. CIV. PROC. CODE § 2030(c)(1). A greater number of interrogatories is warranted by any of the following: (1) The complexity or quantity of the existing and potential issues in the particular case; (2) the financial burden on a party entailed in conducting the discovery by oral deposition; (3) the expedience of using this method of discovery to provide to the responding party the opportunity to conduct an inquiry, investigation, or search of files or records to supply the information sought. *Id.* § 2033(c)(2).

19. CAL. CIV. PROC. CODE § 2030(c)(3).

20. *Id.* § 2030(c)(1). Objection must be in accordance with California Code of Civil Procedure section 2030(f)(3). *Id.* If a responding party seeks a protective order under California Code of Civil Procedure section 2030(e) on the ground that the number of specially prepared interrogatories is unwarranted, the propounding party has the burden of justifying the number of interrogatories propounded. *Id.* § 2030(c)(2). Chapter 86 requires the court to impose a monetary sanction under California Code of Civil Procedure section 2030 against any party who unsuccessfully makes or opposes a motion for a protective order without substantial justification, unless imposing a sanction would be unjust. *Id.* § 2030(e).

21. Summary includes compilations, abstracts, and audits. 1986 Cal. Stat. ch. 1334, secs. 1, 2, at ____ (repealing and enacting CAL. CIV. PROC. CODE § 2030(f)(2)).

22. *Id.*

23. *Id.*

requiring that the summary must not exist *and* the burden of preparing the summary must be substantially the same in order to enable the responding party to elect to specify the writings where the answers can be derived.²⁴

B. Mental and Physical Examinations

Chapter 86 restates the provisions of the Act by providing that when a plaintiff is seeking recovery for personal injuries, a defendant may demand one physical examination of the plaintiff, provided the examination is (1) conducted within seventy-five miles of the examinee's residence and (2) the examination does not include any diagnostic test or procedure that is painful, protracted, or intrusive.²⁵ Chapter 86, however, specifies that if a plaintiff²⁶ fails to serve a timely response to this demand, the plaintiff waives any objection to the demand.²⁷ On motion, however, the court may relieve the plaintiff from this waiver on a determination that (1) the plaintiff has subsequently served a response that is in substantial compliance with the required response provision,²⁸ and (2) the plaintiff's failure to serve a timely response was the result of mistake, inadvertance, or excusable neglect.²⁹

Chapter 86 restates that, in addition to a demand on a personal injury plaintiff, a physical or mental examination may be obtained by (1) leave of court, or (2) written agreement of the parties.³⁰ After an examination, the examined party may demand a copy of the examination report and a copy of all earlier examination reports of the same condition of the examinee made by that or any other examiner.³¹ Chapter 86 specifies that if the demand is exercised, protection for work product³² is waived, both for the examiner's writings and reports and to the taking of the examiner's testimony.³³ Chapter 86 further restates the Act by providing that the party receiving a demand by the examined party is entitled to receive in

24. CAL. CIV. PROC. CODE § 2030(f)(2).

25. *Id.* § 2032(c)(2). See generally *Review of Selected 1986 California Legislation*, 18 PAC. L.J. 500, 520 (initial physical examination of personal injury).

26. Plaintiff includes a cross-complainant and a defendant includes a cross-defendant. CAL. CIV. PROC. CODE § 2032(c)(1).

27. *Id.* § 2032(c)(6)(A).

28. See *id.* § 2032(c)(6)(B). 29. *Id.*

29. *Id.*

30. *Id.* §§ 2032(c) (demands), 2032(d) (leave of court), 2032(e) (written agreements).

31. *Id.* § 2032(h).

32. See generally *id.* § 2018 (work product privilege).

33. *Id.* § 2032(h).

exchange, at the time of compliance, a copy of any existing report of any examination of the same condition, and the prompt delivery of any later report of any previous or subsequent examination of that condition.³⁴ The Act stated that the identity of examining physicians and psychologists who did not make reports was also required in the exchange or reports. Chapter 86, however, has deleted this requirement.³⁵

C. Request for Admissions

Restating the Act, Chapter 86 provides that any party may request that any other party admit the genuineness of specified documents, the truth of specified matters of fact, or opinions relating to fact.³⁶ Chapter 86 further restates that a party may not request another party to admit more than thirty-five matters related to anything other than the genuineness of documents, unless a greater number is warranted by the complexity or the quantity of the existing and potential issues in the case.³⁷ Chapter 86 expands the Act by providing that a party may also request an admission of the application of law to fact.³⁸ Chapter 86 also restates that a party must attach a declaration stating that a greater number of admissions is warranted when requesting more than thirty-five admissions.³⁹ With the enactment of Chapter 86, if the responding party seeks a protective order on the ground that the number of requests for admissions is unwarranted, the propounding party has the burden of justifying the number of requests.⁴⁰

34. *Id.* § 2032(j).

35. Compare *id.* § 2032(j) (no requirement to provide identity of physicians and psychologists who do not submit reports) with 1986 Cal. Stat. ch. 1336, sec. 1, at ____ (enacting CAL. CIV. PROC. CODE § 2032(j)) (party receiving a demand entitled to receive the identity of any other physician and psychologist who made an examination but did not submit a report).

36. CAL. CIV. PROC. CODE § 2033(a). If the initial set of admission requests do not exhaust the limit of 35, the balance may be requested in subsequent sets. *Id.* § 2033(c)(1). The number of requests for admission of the genuineness of documents is not limited except as justice requires to protect the responding party from unwarranted annoyance, embarrassment, oppression, or undue burden and expense. *Id.*

37. *Id.* § 2033(c).

38. Compare *id.* § 2033(a) with 1986 Cal. Stat. ch. 1334, secs. 1, 2, at ____ (repealing and enacting CAL. CIV. PROC. CODE § 2033(a)). See also CAL. CIV. PROC. CODE § 2030(c)(6) (interrogatory not objectionable because answer involves the application of law to fact).

39. *Id.* § 2033(c)(1). Unless a declaration has been made under California Code of Civil Procedure section 2033(c)(3), a party need only respond to the first 35 requests that do not relate to the genuineness of documents, if that party states an objection on the ground that the limit has been exceeded. *Id.*

40. *Id.* § 2033(c)(2).

D. Expert Witnesses

Chapter 86 restates the Act by providing that any party may make a demand for an exchange of information concerning expert trial witnesses.⁴¹ Chapter 86 also restates that any party who engages in the exchange of expert witness information may submit a supplemental list of expert witnesses who will express an opinion on a subject to be addressed by an adverse party's expert if the party supplementing the list has not previously retained an expert to testify on that subject.⁴²

With the enactment of Chapter 86, any party who makes a demand for exchange of witness information must do so no later than the tenth day after a trial date has been set, or seventy days before the trial date, whichever is closer to the trial date.⁴³ Furthermore, the specified date of exchange must be fifty days before the trial date, or twenty days after the service of the demand, whichever is closer to the trial date.⁴⁴ Chapter 86 also provides that the party supplementing an expert witness list must make those witnesses available for a deposition even if the time limit for discovery⁴⁵ has expired.⁴⁶

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41. *Id.* § 2034. The demand must specify the date of exchange of lists of expert trial witnesses, expert witness declarations, and any demanded production of writings. *Id.* § 2034(c). A demand for exchange of expert witness information must be in writing, must identify the party making the demand, and must state that the demand is being made under California Code of Civil Procedure section 2034. *Id.* If a demand for exchange of witness information includes a demand for production of reports and writings, all parties must produce and exchange any discoverable reports and writings made by a designated expert. *Id.* § 2034(g).

42. *Id.* § 2034(h). The supplemental list must be accompanied by an expert declaration and by all discoverable reports and writings, if any, made by those additional experts. *Id.*

43. *Id.* § 2034(b) (unless the court, on motion and a showing of good cause, orders a later or earlier date of exchange). The party demanding an exchange must serve the demand on all parties who have not appeared in the action. *Id.* § 2034(d). The exchange of expert witness information must include: (1) A list of the names and addresses of any persons expected to present any expert testimony, or (2) a statement that the party does not intend to offer the testimony of any expert witnesses. *Id.* § 2034(f)(1).

44. *Id.* § 2034(c).

45. *See id.* § 2024 (discovery time limits).

46. *Id.* § 2034(h).

Civil Procedure; subpoena duces tecum—telephone records

Code of Civil Procedure § 1985.3 (amended); Public Utilities Code § 2891 (amended).

AB 387 (Moore); 1987 STAT. Ch. 149

(Effective as of July 10, 1987)

Existing law requires a subpoena duces tecum for the production of personal records,¹ including telephone records, to be served² in sufficient time to allow the witness³ a reasonable time to locate and produce the records.⁴ Existing law also prohibits a telephone⁵ and telegraph corporation⁶ from disclosing specified information⁷ concerning residential customers or subscribers, except in specified instances.⁸

1. CAL. CIV. PROC. CODE § 1985.3(a)(1) (personal records means the original or any copy of books, documents, or other writings pertaining to a consumer that are maintained by any witness). *See id.* § 1985.3(a)(2) (definition of consumer); *see also id.* § 1985.3(a)(1) (definition of witness).

2. *Id.* § 1985.3(b)(1) (the party must serve or caused to be served a copy of the subpoena duces tecum on the consumer whose records are being sought).

3. *Id.* § 1985.3(a)(1) (a witness includes a physician, pharmacist, pharmacy, hospital, state or national bank, state or federal association, state or federal credit union, trust company, security brokerage firm, insurance company, underwritten title company, attorney, accountant, institution of the Farm Credit System, telephone corporation, psychotherapist, private or public preschool, elementary school, or secondary school). *See* CAL. FIN. CODE § 5102 (definition of state or federal association); 12 U.S.C. § 2002 (1971 & Supp. 1985) (specification of institution of the Farm Credit System); CAL. PUB. UTIL. CODE § 216 (definition of telephone corporation which is a public utility); CAL. EVID. CODE § 1010 (definition of psychotherapist).

4. CAL. CIV. PROC. CODE § 1985.3(d).

5. CAL. PUB. UTIL. CODE § 216 (definition of telephone corporation that is a public utility); *id.* § 234 (definition of telephone corporation).

6. CAL. PUB. UTIL. CODE § 216 (definition of telegraph corporation that is a public utility).

7. Information prohibited from disclosure by telephone and telegraph corporations would include: (1) The customer's or subscriber's personal calling patterns, including any listing of the telephone or access numbers called by the customer or subscriber; (2) the residential customer's or subscriber's credit or other personal financial information; (3) services obtained from the corporation or from independent suppliers of information services who use the corporation's telephone or telegraph line to provide services to the residential customer; or (4) demographic information about the residential customer or subscriber, either as an individual or aggregate. *Id.* § 2891(a)(1)-(4). *But see id.* § 2891(a)(1) (the identification of the person calling to the person called and the telephone number from which the call was placed may be released without consent); *id.* § 2891(a)(2) (customers credit or other financial information must be released to provide the information to any electrical, gas, heat, telephone, telegraph, or water corporation for the purpose of determining the credit worthiness of new subscribers).

8. *Id.* § 2891. Disclosure concerning information provided by the subscriber for inclusion in the corporation's directory of subscribers, information customarily provided by the corporation through directory assistance services, postal zip code information, information provided under supervision of the commission to a collection agency by a telephone corporation exclusively for the collection of unpaid debts, information provided to an emergency service agency responding to a 911 telephone call, information required by a law enforcement agency

Pursuant to Chapter 149, a subpoena duces tecum for the personal records maintained by a telephone corporation is not valid unless the consumer's consent for release is contained within the subpoena.⁹ Chapter 149, however, allows the disclosure to law enforcement agencies of information requested in response to lawful process issued under state or federal law.¹⁰

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pursuant to a warrant issued by a superior court or a court of higher jurisdiction, or information which is required by the commission pursuant to jurisdiction and control over telephone and telegraph corporations is not subject to the provisions of Chapter 149. *Id.* § 2891(d).

9. CAL. CIV. PROC. CODE § 1985.3(f).

10. CAL. PUB. UTIL. CODE § 2891(d).

Civil Procedure; proof of service by mail

Code of Civil Procedure § 1013(a) (amended).

AB 727 (Lancaster); 1987 STAT. CH. 190

Under existing law, proof of service by mail may be made by an affidavit¹ or certificate² of deposit in the mail.³ With the enactment of Chapter 190, proof of service by mail may also be made by an

1. The affidavit must (1) set forth the exact title of the document to be served and filed in the cause, (2) show the name and residence or business address of the person making the service, (3) show that that person is a resident of or employed in the county where the mailing occurs and is over the age of 18 years and is not a party to the action, (4) show the date and place of deposit in the mail and the name and address of the person served, and (5) show that the envelope was sealed and deposited with the postage fully prepaid. CAL. CIV. PROC. CODE § 1013a(1).

2. The certificate may be made by an active member of the State Bar of California or the clerk of the court of record. *Id.* § 1013a(2), (3). In either case, the certificate must (1) set forth the exact title of the document to be served and filed in the cause, (2) identify the person making the service, (3) show that that person is not a party to the action, (4) show the date and place of deposit in the mail and the name and address of the person served, and (5) show that the envelope was sealed and deposited with the postage fully prepaid. *Id.*

3. *Id.* § 1013a. See *Caldwell v. Geldreich*, 137 Cal. App. 2d 78, 81, 289 P.2d 832, 834 (1955) (burden is not on sender to show that notice served by mail was actually received by the addressee). See also *Valley Vista Land Co. v. Nipomo Water and Sewer Co.*, 255 Cal. App. 2d 172, 174, 63 Cal. Rptr. 78, 80 (1967) (successful service by mail requires strict compliance with the statute). But see *Cavanaugh v. Workmen's Compensation Appeals Board*, 255 Cal. App. 2d 181, 182, 62 Cal. Rptr. 871, 872 (1967) (the provisions of California Code of Civil Procedure section 1013a are not exclusive and do not forbid the method of proof of service adopted in Rules, Practice, and Procedure, title 8, section 10520 of the California Administrative Code).

affidavit setting forth the exact title of the document served and filed in the cause that shows the following: (1) The name and residence or business address of the person making the service; (2) that the person is a resident of, or employed in, the county where the mailing occurs; (3) that the person is over the age of eighteen years and not a party to the action; (4) that the person is readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service; (5) that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business; (6) the name and address of the person served as shown on the envelope, and the date and place of business where the correspondence was placed for deposit with the United States Postal Service; and (7) that the envelope was sealed and placed for collection and mailing on that date following ordinary business practices.⁴

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4. CAL. CIV. PROC. CODE § 1013a(3). Upon motion of the party served, this method of service is presumed invalid if the postal cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing contained in the affidavit. *Id.*

Civil Procedure; statement of decision

Code of Civil Procedure § 632 (amended).
SB 845 (Robbins); 1987 STAT. CH. 207

Under existing law, when a question of fact is tried by a court,¹ written findings of fact and conclusions of law are not required.² Existing law, however, requires the court to issue a statement of decision³ when requested by a party.⁴ Existing law requires the request

1. CAL. CIV. PROC. CODE § 632 (including a superior, municipal, or justice court).

2. *Id.* See *R. E. Folcka Constr., Inc. v. Medallion Home Loan Co., Inc.*, 191 Cal. App. 3d 50, 52, 236 Cal. Rptr. 202, 203 (1987) (holding that the trial court properly rejected as untimely the defendants' request for a statement of decision made thirty days after the court issued the intended decision on a trial lasting less than four hours over two separate days).

3. CAL. CIV. PROC. CODE § 632 (the statement of decision must explain the factual and legal basis for decision as to each of the principal controverted issues). See generally 7 B. WITKIN, CALIFORNIA PROCEDURE, *Trial* §§ 368-72 (3rd ed. 1985) (discussing the historical background of statements of decision as well as their role in superior, municipal, and justice courts).

4. CAL. CIV. PROC. CODE § 632 (the party must have appeared at the trial). See *In re*

to be made within ten days after the court announces a tentative decision.⁵ Under Chapter 207, the request must be made before the matter is submitted for decision when the trial is completed within one calendar day or in less than eight hours over one day.⁶ Existing law provides that a statement of decision must be in writing.⁷ Chapter 207 waives the writing requirement when the trial lasts one calendar day or less than eight hours over one day, provided the statement of decision is made orally on the record in the presence of the parties.⁸

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Marriage of Benjamin S. & Teddy S., 171 Cal. App. 3d 738, 747, 217 Cal. Rptr. 561, 566 (1985) (citing *In re Marriage of Davis*, 141 Cal. App. 3d 71, 74-75, 190 Cal. Rptr. 104, 106) (holding that written findings of fact benefit the court by allowing the court to place the findings of fact and the conclusions of law of the case in definite written form, thereby making the case easily reviewable on appeal, and benefit the parties because in many instances written findings permit review without great expense).

5. CAL. CIV. PROC. CODE § 632. See *Milligan v. Hearing Aid Dispensers Examining Comm.*, 142 Cal. App. 3d 1002, 1004 n.3, 191 Cal. Rptr. 490, 492 n.3 (1983) (holding that a request for a statement of decision was not timely when made three weeks after the matter was submitted at the conclusion of a trial which lasted less than one day). See also *Wolfe v. Lipsy*, 163 Cal. App. 3d 633, 643, 209 Cal. Rptr. 801, 808 (1985) (no error when a trial court adopted a memorandum of intended decision as a statement of decision since the factual and legal basis for the decision was completely set forth).

6. CAL. CIV. PROC. CODE § 632. See March 27, 1987, letter from Constance E. Dove, Executive Director of the California Judges Association, to Senate Judiciary Committee (copy on file at *Pacific Law Journal*). Chapter 207 was enacted to remove an unintended limitation on the one-day trial by allowing a court to issue an oral statement of decision on a short cause matter which may start late in the day and continue into the following day. *Id.*

7. CAL. CIV. PROC. CODE § 632.

8. *Id.* See *Gordon v. Wolfe*, 179 Cal. App. 3d 162, 166, 224 Cal. Rptr. 481, 482-83 (1986) (holding that although the trial may have lasted fewer than eight hours, the trial was conducted over more than one court calendar day, therefore requiring a statement of decision). But see *Mitchell v. County of Orange*, 165 Cal. App. 3d 1185, 1189, 211 Cal. Rptr. 563, 565-66 (1985) (holding that although the trial was conducted over a period of two days, only three hours of court time was used, so the trial lasted less than one day and a statement of decision was not required).

Civil Procedure; discovery—settlement offers

Business and Professions Code § 6103.5 (amended).
SB 321 (Lockyer); 1987 STAT. CH. 213

Under prior law, any written offer of settlement¹ or any communication² of a settlement offer from a member of the State Bar³ to a client⁴ was discoverable by either party.⁵ Chapter 213 limits discovery of the existence or communication of a settlement offer to actions in which the existence or communication of the offer is an issue before the trier of fact.⁶

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1. CAL. CIV. PROC. CODE § 998(b) (not less than 10 days prior to commencement of trial any party may serve an offer in writing upon any other party to the action to allow judgment to be taken in accordance with the terms and conditions of the offer).

2. CAL. BUS. & PROF. CODE § 6103.5(a) (members of the State Bar must promptly communicate to their clients all amounts, terms, and conditions of any written settlement offer made by or on behalf of an opposing party).

3. *Id.* § 6002 (members of the State Bar include all persons admitted and licensed to practice law in this state except justices and judges of courts of record).

4. *Id.* § 6103.5(a) (client means one who employs a member of the State Bar who possesses the authority to accept an offer of settlement, or in a class action, who is a representative of the class).

5. 1986 Cal. Stat. ch. 1238, sec. 1, at 689 (enacting CAL. BUS. & PROF. CODE § 6103.5).

6. CAL. BUS. & PROF. CODE § 6103.5(b). *See* July 14, 1987 letter from Senator Bill Lockyer to Governor George Deukmejian (on file at the *Pacific Law Journal*). Under 1986 Cal. Stat. ch. 1238, sec. 1, at 689 (enacting CAL. BUS. & PROF. CODE § 6103.5), members of the State Bar are required to communicate promptly to their clients all terms and conditions of any written settlement offer, and the communication is discoverable by either party. *Id.* The discoverability of the communication of the offer was meant to apply only to a subsequent legal malpractice action, where the former client is claiming that his attorney never told him about the offer. *Id.* Chapter 213 clarifies a possible ambiguity in current law that could be interpreted as allowing a violation of the attorney-client privilege. Chapter 213 specifies that a communication of an offer between attorney and client is only discoverable when the existence of the communication is an issue before the trier of fact. *Id.*

Civil Procedure; extraordinary services—compensation for paralegal services

Probate Code §§ 469, 910, 932, 2632, 2640, 2642 (amended).
AB 1334 (Wright); 1987 STAT. Ch. 358

Under existing law, an attorney may receive legal fees for extraordinary services¹ rendered to a special administrator,² executor,³ guardian, or conservator⁴ in the event those persons die or become incompetent.⁵ Chapter 358 expands existing law by allowing an attorney to be compensated for extraordinary services performed by paralegals under the direction of an attorney.⁶ To receive compensation for services rendered by a paralegal, the attorney must enumerate in an application to the court the hours spent and the services performed by the paralegal.⁷

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1. See *Estate of Dunton*, 15 Cal. App. 2d 729, 731, 60 P.2d 159, 160 (1936) (attorney was entitled to extra compensation for extraordinary services).
 2. See CAL. PROB. CODE § 463 (powers and duties of a special administrator).
 3. See *id.* § 410 (qualifications for an administrator).
 4. See *id.* § 2400 (definition of guardian or conservator).
 5. *Id.* § 932. The court may award attorney fees as deemed proper. *Id.* § 910.
 6. *Id.* §§ 469, 932, 910.
 7. *Id.*

Civil Procedure; notice requirements—unlawful detainer actions

Code of Civil Procedure § 1174.3 (amended).
AB 2245 (M. Waters); 1987 STAT. Ch. 720

Under existing law, in certain circumstances, a tenant may be served with eviction papers without warning.¹ However, existing case

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1. See, e.g., *Arrieta v. Mahon*, 31 Cal. 3d 381, 384, 644 P.2d 1249, 1250-51, 182 Cal. Rptr. 770, 771-72, (1982). In *Arrieta*, the landlord had served notice upon, and received judgment against, a prior tenant; therefore, until the writ of execution and notice to vacate were posted on her door, the tenant in possession of the premises knew nothing of the unlawful detainer proceedings. *Id.* See generally CAL. CIV. PROC. CODE §§ 1174 (judgment for

law provides that eviction without notice or hearing is unconstitutional.² Chapter 720 appears to cure this potential problem by providing for service of the required notice at or after a hearing.³

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possession of premises in unlawful detainer proceedings), 715.010 (judgment for possession of real property enforceable by writ of possession of real property).

2. *Arrieta*, 31 Cal. 3d at 390, 644 P.2d at 1254, 182 Cal. Rptr. at 775 (1982) (such an eviction is contrary to the fourteenth amendment of the United States Constitution and article I, section 7 of the California Constitution).

3. CAL. CIV. PROC. CODE § 1174.3(e)(1). Service may be by first-class mail to the tenant or the tenant's attorney. *Id.* See generally *id.* § 1013 (service by mail). If, after service of notice, the breach upon which the unlawful detainer is based is not timely cured, the plaintiff landlord may file and serve a supplemental complaint. *Id.* § 1174.3(e)(1). Chapter 720 further specifies that its provisions do not apply to an invitee, licensee, guest, or trespasser. *Id.* § 1174.3(d).

Civil Procedure; emergency restraining orders

Code of Civil Procedure § 546 (amended).

AB 1599 (Speier); 1987 STAT. CH. 758

(Effective July 1, 1988)

Existing law authorizes the superior court, during working hours, to issue restraining orders¹ to protect against domestic violence.² Chapter 758 allows emergency restraining orders to be issued orally by a judge, referee, or commissioner at all times when the superior court is not in session.³ The designated judicial officer may issue an emergency protective order pursuant to a finding by a police officer or sheriff's officer that there are reasonable grounds to believe that a person is in immediate danger of domestic violence by a family or

1. CAL. CIV. PROC. CODE § 525 (definition of injunction).

2. CAL. CIV. CODE § 4359(a)(2) (ex parte order may enjoin any party, and upon good cause family and household members, from contacting, molesting, attacking, striking, threatening, sexually assaulting, battering, or disturbing the peace of the other party); *id.* § 4359(a)(3) (excluding one party from the family dwelling or from the dwelling of another); *id.* § 4359(a)(6) (enjoining a party from specified behavior which the court determines is necessary to effectuate the orders).

3. CAL. CIV. PROC. CODE § 546(b) (orders may be issued by telephone or otherwise). The presiding judge of the superior court in each county must designate not less than one judicial officer to be reasonably available. *Id.* The order must be issued without prejudice to any party. *Id.*

household member.⁴ In addition, a protective order can consist of the same type of orders that are available under protective orders issued during regular court sessions.⁵ Upon a finding by a judicial officer that reasonable grounds have been asserted to believe that an immediate danger exists and that an emergency order is necessary to prevent the occurrence or reoccurrence of domestic violence, an emergency order may be issued.⁶ The order must include: (1) A statement of the grounds asserted for the order; (2) the date and time the order expires; (3) the address of the superior court in the district where the protected person resides; and (4) a statement to the protected and restrained parties advising them of procedures and legal remedies available.⁷

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4. *Id.* § 546(b) (the danger of violence is based on the person's allegations of any recent incidents of abuse or threats of abuse). An officer requesting the order must write-up and sign the order and keep copies of the order while on duty. *Id.* The officer must serve the order upon the restrained party, if the party can be reasonably located, and must give a copy to the protected party. *Id.* An emergency protective order expires no later than the close of judicial business on the next judicial day following the date of issuance. *Id.* Police officers must use every reasonable means to enforce an order issued and are not criminally or civilly liable if acting in good faith. *Id.*

5. CAL. CIV. CODE § 4359(a)(2), (3), (6). The order may also determine the temporary control and custody of any minor children endangered. CAL. CIV. PROC. CODE § 546(a). The availability of an order is not affected because the endangered person has vacated the home to avoid abuse. *Id.* § 546(b).

6. *Id.*

7. *Id.* § 546(b)(1)-(4). The Judicial Council must prescribe the form of the order and any other documents required, and must print the order in English and Spanish. *Id.* § 546(b).

Civil Procedure; sliding scale recovery agreement

Code of Civil Procedure § 877.5 (amended).

AB 344 (Connelly); 1987 STAT. CH. 1202

Existing law imposes requirements regarding a sliding scale recovery agreement¹ between alleged defendant tortfeasors and a plaintiff.² Prior law required the court to disclose the agreement to the jury to

1. CAL. CIV. PROC. CODE § 877.5(b) (definition of sliding scale recovery agreement).

2. *Id.* § 877.5(a). The parties entering into any sliding scale recovery agreement must inform the court of the existence, terms, and provisions of the agreement. *Id.* § 877.5(a)(1).

insure that the jury understood the essential nature of the agreement.³ Chapter 1202 specifies that the required jury disclosure must contain no more than is necessary to inform the jury of the possibility that the agreement may bias the testimony of a party to the agreement.⁴ Furthermore, pursuant to Chapter 1202, a sliding scale recovery agreement is not effective unless a notice of intent to enter into an agreement has been served on all nonsignatory alleged defendant tortfeasors.⁵

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3. 1977 Cal. Stat. ch. 568, sec. 1, at 1798 (enacting CAL. CIV. PROC. CODE § 877.5). *But see id.* (disclosure does not include the amount paid or any contingency, or the possibility that the agreement may bias the testimony of the tortfeasor who entered into the agreement).

4. CAL. CIV. PROC. CODE § 877.5(a)(2).

5. *Id.* § 877.5(c).

Civil Procedure; public entity—settlements, conferences, judgments, payments

Code of Civil Procedure § 1141.11 (amended); Government Code §§ 962, 984 (new).

AB 1909 (Harris); 1987 STAT. CH. 1204

Existing law provides for the judicial arbitration of civil actions if the amount in controversy will not exceed twenty-five thousand dollars.¹ Chapter 1204 increases this limit to fifty thousand dollars.² Upon entry of a verdict against a public entity³ in excess of one hundred thousand dollars, and upon request of the public entity, Chapter 1204 requires that a settlement conference be held to discuss methods of satisfying the judgment.⁴ Existing law also permits a public entity to pay a judgment in installments.⁵ Chapter 1204

1. CAL. CIV. PROC. CODE § 1141.11(a), (b).

2. *Id.*

3. CAL. GOV'T CODE § 811.2 (definition of a public entity).

4. *Id.* § 962.

5. *Id.* § 970.6(a). The local public entity may make installment payments if: (1) The governing body adopts an ordinance or resolution finding that a serious financial burden will result if the judgment is not paid in installments, and (2) the court finds that a serious financial burden will result to the local public entity. *Id.* § 970.6(a), (b).

expands existing law by authorizing a public entity to elect to pay a portion of the judgment by installment payments in specified circumstances.⁶ Chapter 1204 also specifies rules for installment payments,⁷ including terms, interest rate, liability, and continued jurisdiction of the court.⁸

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6. *Id.* § 984(c), (d). A judgment against a public entity may be paid in installments if the judgment on a tort claim action that is not insured is greater than \$500,000. *Id.* See *id.* § 984(a) (definition of not insured). See *id.* § 970.6 (conditions of installment payments); CAL. CIV. PROC. CODE § 667.7 (action against health care providers).

7. CAL. GOV'T CODE § 984(e).

8. *Id.*

Civil Procedure; appearance by telephone

Business and Professions Code § 470.3 (amended); Government Code § 68070.1 (new).

AB 2294 (Killea); 1987 STAT. CH. 1431

Under existing law, courts may establish rules that are consistent with the rules adopted by the Judicial Council.¹ Under Chapter 1431 counsel shall have the option to appear by telephone in nonevidentiary law and motion, probate, and trial setting hearings and conferences in superior court.² Chapter 1431 also provides that each party³ who elects to use teleconferencing procedures shall pay all costs.⁴

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1. CAL. GOV'T CODE § 68070 (court cannot impose taxes, charges or penalties for legal proceedings or filings).

2. *Id.* § 68070.1 (on or before January 1, 1989, in counties not subject to the Trial Court Delay Reduction Act of 1986). See CAL. CONST. art. VI, § 4 (creation of superior courts).

3. CAL. GOV'T CODE § 68070.1(c) (found to have the ability to pay).

4. *Id.*; see also *id.* § 68070.1(b) (on or before March 1, 1988, the Judicial Council must establish a pilot project for teleconferencing).

